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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1386

ALFRED J. ERDOS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH COURT

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v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH COURT

The petitioner, Alfred J. Erdos, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment of conviction entered by the United States District Court for the Eastern District of Virginia, Alexandria Division.

OPINIONS BELOW

The opinion of the District Court on the issue of jurisdiction and the opinion of the Court of Appeals which are not yet officially reported are reprinted in

the Appendix to this Petition at 6a-18a. The order denying rehearing is at App. 19a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1973, and a petition for rehearing was denied on March 15, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1964).

QUESTIONS PRESENTED

1. Whether a United States District Court has jurisdiction under 18 U.S.C. § 7(3) to try the petitioner for an unlawful homicide occurring within an American Embassy located in a foreign country where Congress neither expressly provided nor intended extraterritorial effect for the statute.

2. Whether in the unique circumstances of this case petitioner was denied his right to fair trial guaranteed by the fifth and sixth amendments, particularly:

a. Where petitioner was deprived of exculpatory evidence by the trial court's arbitrary denial of a continuance necessary to secure witnesses and the Government's refusal to stipulate to the testimony of the unavailable witnesses;

b. Where petitioner was prohibited from cross-examining the principal witness against him, a psychiatrist, based upon a reputable psychiatric treatise; and

c. Where the trial court allowed the Government to invoke executive privilege and block relevant evidence without adhering to the standards of *United States* v. *Reynolds*, 345 U.S. 1 (1953).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions involved appear in the Appendix hereto at App. 1a-5a.

STATEMENT OF THE CASE

Introduction

On November 11, 1971, an indictment was returned charging Alfred J. Erdos in two counts with premeditated murder in violation of 18 U.S.C. § 1111, and the unlawful killing of a security officer of the Department of State, in violation of 18 U.S.C. § 1114.[1] On March 3, 1972, after a trial by jury, Erdos was convicted of voluntary manslaughter, 18 U.S.C. § 1112. That same day he was sentenced to commitment to the custody of the Attorney General for the maximum period of ten years.

Erdos was convicted of voluntary manslaughter for killing Donald J. Leahy on August 30, 1971, in the United States Embassy in Santa Isabel, Equitorial Guinea. At the time, Erdos and Leahy were both United States citizens employed by the Department of State. Erdos was the chargé d'affairs of the Embassy, and Leahy was his administrative assistant, a general services officer. At his trial, Erdos admitted killing Leahy by stabbing him with a pair of scissors. He interposed the defense of insanity, asserting that the pressures of the paranoid political structure of Equatorial Guinea drove him to a mental breakdown, and he took Leahy's life while suffering from an acute paranoid psychosis and governed by the delusion that Leahy was a communist agent and a direct threat to

[1] This count was dismissed by the Government prior to trial (T. 1/20/72 at 3).

himself, his family and his country. The Government contended, on the other hand, that Erdos had killed Leahy as a reaction to a homosexual act and, aided by his wife, feigned insanity in order to cover up his crime. Erdos denied having had any homosexual contact with Leahy.

The Setting and Circumstances of Leahy's Death

The Republic of Equitorial Guinea is located in west-central Africa. The country was a Spanish colony until October 12, 1968, when it became an independent nation. The United States established diplomatic relations with the country on November 21, 1968, and our Embassy was located in Santa Isabel, the capital, in premises leased by the United States from a private citizen of Equitorial Guinea.

The Erdoses knew prior to their arrival that the government of Equatorial Guinea was hostile to former colonial powers. They knew also that its president, Macias, who ruled by fiat, maintained power by force and was extremely sensitive to criticism. Consequently, Erdos was constantly concerned about his conduct lest it be misinterpreted by the President. (T. 238-43; 246-48; 251-53).

During the initial months of their stay, the country was relatively calm. (T. 533). In mid-August this changed drastically. The government began a wave of mass arrests which became a particular concern to Erdos when, beginning on August 19, the arrestees included his local employees (T. 305-09). During the next two weeks, other extraordinary acts by the government heightened his anxiety. The government restricted his travel, placed a guard outside the embassy and interfered with his communication with other diplomats (T. 313, 314, 317, 321, 725).

Erdos was concerned about his employees because he was aware of beatings and tortures administered by the Equatorial Guinean government. He became frustrated with the inappropriate guidance from the State Department and his inability to obtain any explanation from the Equatorial Guineans (T. 310, 312, 332, 723). The debilitating effect of this on Erdos was noted by State Department officials due to the marked change in the form, content, and frequency of his reports beginning about August 19. Then, by Saturday and Sunday, August 28 and 29, Erdos displayed obvious physical signs of his distress. (T. 329, 331, 333, 733).

Sunday night, Erdos suddenly saw his situation from a brand new angle. This point was fixed by defense psychiatrists as the beginning of the acute phase of his mental illness marked by delusional thinking. His complex delusional thoughts defy summary. In essence, he perceived a plot against him and the United States whereby he would be set up for assassination upon trumped-up charges of collaboration with enemies of the Equatorial Guinean government. (T. 326-29, 741)

Monday morning, Erdos worked feverishly to get the news of his discovery to his government. With the assistance of Leahy he prepared and coded a message conveying the essence of the plot.[2] This message was

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[2] A decoded copy of this message retrieved from the burn bag of the Embassy was proferred as Defense Exhibit 69 in part to demonstrate the critical point that Leahy was alive at a time when Erdos was delusional. The court's erroneous exclusion of this exhibit is discussed at footnote 9, *infra*. Defense Exhibit 69 appears in the appendix below at 229. Memoranda of Erdos's radio communications later that day also reflecting his delusional thinking were Defense Exhibits 1 and 74 appearing in the appendix below at 231 and 233.

never sent because by noon Erdos had focused on Leahy as the communist-agent mastermind of the plot. Acting on his suspicion, Erdos got Leahy into the vault within the Embassy, where, brandishing scissors, he tied him up. Erdos confronted him with the accusation of conspiracy and every innocent past action of Leahy took on sinister connotations convincing Erdos of Leahy's guilt. Fearing his enemies were immediately outside the Embassy, Erdos turned to the radio as his only hope for rescue. Erdos maintained radio contact with Accra, Ghana throughout the afternoon and his reporting of the situation as he saw it was monitored and recorded. (T. 348-360) Because of irrational directions to him by officials at the end of the afternoon, Erdos broke off radio contact, convinced that even that avenue of communication was compromised. Thereafter Leahy, who had been tied to the chair during the radio transmission, complained about the tightness of bonds and Erdos decided to retie him. During this process, Leahy jumped out of the chair and Erdos stabbed and killed him to prevent his escape. (T. 367-70).

In the hours immediately after Leahy's death, Erdos talked with four people—his wife, Leonard Shurtleff, an American sent to the island, Cienfuegos the Spanish Chargé, and Bassey the Nigerian Ambassador. Erdos readily admitted to each of them that he killed Leahy. He immediately told his wife, the Spanish Chargé and the Nigerian Ambassador about the plot and, as he had done all that day, Erdos pleaded with his listeners to believe him and not to think he was insane. (T. 76, 380-382, 754-755).

After the killing, the Erdos family remained with the Nigerian Ambassador at his residence until Thurs-

day, September 2, when they left Santa Isabel. During this stay, Erdos continued to manifest symptoms of his illness. Upon his return to the United States he was hospitalized by the State Department in the ward for acutely ill mental patients at George Washington University Hospital.

Pretrial Proceedings

Petitioner challenged the jurisdiction of the United States District Court by a pretrial motion to dismiss the indictment on the ground that no federal statute granted jurisdiction to United States courts over the homicide. Petitioner also moved to obtain the Government's assistance in entering Equatorial Guinea to conduct an on-the-scene investigation of the circumstances surrounding the killing and to interview Erdos' diplomatic colleagues and the officials of the Equatorial Guinean government with whom he had had contact at the time of the killing. In the alternative, the motion sought dismissal of the indictment, asserting that absent such an investigation any subsequent trial would violate the fifth and sixth amendments of the Constitution. An evidentiary hearing on the motions was held on January 20, 1972, at which time the Department of State informed the court that no one could enter Equatorial Guinea to investigate the case or they would be arrested (T. 1/20/72, 191; Gov't. Exh. 5). The court then denied the motions to dismiss but encouraged the Government to assist the defense by stipulating to any material evidence. The Government agreed to assist the defense efforts to obtain the witnesses, conceding that independent efforts by defense counsel would otherwise be futile (T. 1/20/72, 187-90, 197-214).

The defense promptly dispatched letters to six of Erdo's diplomatic colleagues[3] who possessed important information, seeking to determine under what conditions their testimony could be obtained. On February 16, 1972, the State Department informed defense counsel that insufficient time existed to have any of these witnesses or their testimony available on February 28, 1972. On February 18, 1972, the defendant moved to continue the trial from February 28, until May 1, 1972, to attempt to obtain the testimony. The Government did not oppose the motion and moved for a continuance itself on other grounds. Both motions were denied. (App. 6a-9a).

Later, the Department of State informed the defense that the government of Ghana would make available the testimony of Mr. Munge by letters rogatory. The defense renewed its motion for a continuance on the first day of the trial, February 28, 1972 (T.2). Counsel informed the court that although the Spanish government had refused to permit Mr. Cienfuegos to testify or be interviewed, the government of Ghana was willing to make its diplomat available by letters rogatory and the French and Nigerian governments had not yet made any decision (T. 2, 3). The court ruled that testimony obtained by letters rogatory or deposition was not admissible and denied the motion. (T. 3,4,5).

Counsel then attempted to obtain stipulations of the expected testimony of Robert, Cienfuegos, and Bassey

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[3] Specifically, Mr. Jose Cienfuegos, the Spanish Chargé, Ambassador Mbombo Njoyia, Ambassador of the Cameroon, Nigerian Ambassador Bassey, Mr. Frances Maathey, Counsellor of the Embassy of Ghana, Mr. Jean Robert, the French Chargé, and Mr. Elamé Munge, Counsellor of the Embassy of Ghana.

based on their statements to a United States official, classified messages from the Department of State, and information provided by the defendant (T. 10). After examining the stipulations, the court encouraged the Government to stipulate to any evidence helpful to the defense regarding the defendant's action immediately preceding or following the killing. The Government objected to the stipulations (T. 15-17), and the court reaffirmed its denial of the continuance.

Trial Proceedings

The Government presented three witnesses in its case-in-chief: Dr. William F. Enos testified as to the cause of death and to a finding of spermatozoa in the victim's pharynx and esophagus. Mr. Shurtleff recounted the circumstances of his meeting with Erdos at the Embassy, Erdos's admission to him that he had killed Leahy, the discovery and removal of Leahy's body, and his subsequent investigation of the Embassy. The final Government witness, Lannon Walker, described portions of Erdos's radio messages on August 30, and Erdos's conduct in traveling from the Nigerian Ambassador's house to Douala. He also identified various pieces of physical evidence taken from the Embassy, *e.g.*, the scissors which Erdos used to kill Leahy, several jackets and some electrial cord found in the vault.

The defense's case consisted primarily of the testimony of petitioner and his wife concerning the events leading up to and occurring on August 30, with Erdos denying that he had any homosexual contact with Leahy; testimony concerning the radio transmissions of Erdos on August 30 (T. 648-657); Erdos's contact with the Department of State, describing Erdos's reporting

in August (T. 658-666); Ambassador Hoffacker, concerning his selection of Erdos for the position and his assignment, his observation that Erdos was not the man he had known when he saw him shortly after Leahy's death (T. 673-688); and four nurses from the George Washington University Hospital who had attended Erdos from the time he was hospitalized on September 4. The defense also called two psychiatrists, Dr. David H. Fram, the psychiatrist who had been retained by the Department of State to treat Erdos, and Dr. Leon Yochelson, who was retained by the defense. Both doctors testified that petitioner was suffering from an acute paranoid psychosis at the time he killed Leahy.

In rebuttal, the Government called several witnesses who contradicted certain aspects of the defense case but primarily relied on the testimony of two court-appointed psychiatrists, Drs. George D. Weickhardt and Emory H. Hodges. Both testified that Erdos was not suffering from a mental illness when he killed Leahy but that he had subsequently feigned a mental illness to avoid responsibility for his crime. (T. 1017, 1018, 1024, 1038, 1069, 1079, 1085).

The Court of Appeals' Holding

On appeal, petitioner again challenged jurisdiction and raised numerous other errors. The Court of Appeals sustained the District Court's jurisdiction and dismissed without comment thirteen assignments of error as meritless. The Court of Appeals did find that petitioner's right to cross-examination of the Government psychiatrist was improperly curtailed but found the error harmless because "Erdos was given every

opportunity during his trial to present evidence supporting his defense of insanity."

REASONS FOR GRANTING THE WRIT

1. Jurisdiction

This petition presents an issue of federal jurisdiction of exceptional importance which has not been, but should be, settled by this Court; namely, the extraterritorial effect to be afforded certain criminal statutes pursuant to 18 U.S.C. § 7. The Court of Appeals sustained the District Court's jurisdiction over this homicide pursuant to 18 U.S.C. § 1112, which proscribes manslaughter within the special maritime and territorial jurisdiction of the United States as that term is defined in 18 U.S.C. § 7(3), which encompasses in pertinent part:

> (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

In holding that this so-called "acquired lands" section extends federal criminal jurisdiction to homicide in an American Embassy abroad, the Court of Appeals distorted the plain meaning of the statute, misread its legislative history, and disregarded the applicable principles of statutory construction.

Congress, in exercising its power to define crimes, has generally confined them to the territorial limits of the United States. This Court has thus held that legislation is presumptively territorial, and the presumption

can only be overcome by finding an express intent for extraterritorial effect in the statute or its legislative history.[4] Moreover, statutes defining criminal jurisdiction must be construed strictly. See, *e.g.*, *United States* v. *Wiltberger*, 18 U.S. 76, 95 (1820), interpreting a predecessor subsection of 18 U.S.C. § 7. Since the land acquired by the United States for its Embassy was not a part of United States territory,[5] § 7(3) must be strictly construed to determine if Congress expressly intended it to apply extraterritorially. The Court of Appeals' approach was the antithesis of these principles.

The Court of Appeals first recognized, as does the petitioner, that Congress has the power to proscribe the killing of an American citizen by another American citizen within a diplomatic compound located in a foreign country. The critical question, whether Congress had exercised that power, involves statutory construction. The Court of Appeals construed the statute

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[4] *United States* v. *Spelar*, 338 U.S. 217 (1949); *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949); *United States* v. *Flores*, 289 U.S. 137, 155 (1933); *Blackmer* v. *United States*, 284 U.S. 421, 437 (1931); *United States* v. *Bowman*, 260 U.S. 94, 97, 98 (1922); *Sandberg* v. *McDonald*, 248 U.S. 185, 196 (1918); *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 357 (1908).

[5] The United States acquired the use of this land for its embassy by a lease agreement between the Department of State and a private citizen of Equatorial Guinea and not by conquest or treaty with the government of Equatorial Guinea, the only means by which the land could be made a part of United States territory. *Fleming* v. *Page*, 9 How. 603 (1850); *Dorr* v. *United States*, 195 U.S. 138 (1904). It is well settled that the land on which our embassies abroad are situated is not United States territory and criminal acts committed there are acts committed within the territories of the countries in which they are located. See generally, 7 Whiteman, *Digest of International Law* (1970), pp. 353-57; and 6 Whiteman, *Digest of International Law* (1968), pp. 278-80.

by compartmentalizing the phrases of § 7(3) and asking whether its third phrase "modifies and limits the more general coverage of the preceding two phrases." App. at 13a. Finding the plain meaning and the legislative history unclear and conceding that Congress may not have focused on extraterritorial jurisdiction at all in the enactment, the court stated its perspective on statutory construction as follows: "Where the power of Congress is clear, and the language of exercise is broad, we can perceive no duty to construe a statute narrowly." App. at 13a. The court then held that the first two phrases of § 7(3) create a jurisdictional category without territorial limits—"lands reserved or acquired for the use of the United States and under its exclusive or concurrent jurisdiction"—and that the third phrase, restricted by its terms to the territorial confines of the United States is separate and distinct.

The Court of Appeals' perspective on statutory construction is fundamentally unsound. The only expression of Congressional intent on the face of the statute is that it be applied territorially. The Court of Appeals sought to avoid this limitation by confining it to the last phrase and then elevating the absence of any limitation in the remaining phrases into an intention of extraterritorial application. The court's reasoning was an express rejection of strict construction and ignored the territorial presumption. Cutting off a phrase in a statute expressing a territorial intent and finding no express intent in the remainder, the court liberally construed the statute to achieve extraterritorial effect.

The legislative history of the statute confirms that the Court of Appeals' parsing of the whole constitutes a misinterpretation of Congress' intent. That history demonstrates that the statute went through

three stages: the original grant of jurisdiction closely tied to its constitutional source, an expansion of the statute to encompass new methods of acquisition of lands from the states, and modification of the requirement of exclusive jurisdiction in order to meet a problem of federalism. With each change, however, Congress expressly indicated it did not intend to expand the original scope of the statute, which was strictly territorial.

The last phrase of the present § 7(3) reflects the wording of the original constitutional source of the statute, Article I, Section 8, Clause 17, which empowered Congress to legislate over the seat of government and lands purchased from the states with the consent of the legislatures. The progenitor of § 7(3) appeared in the Crimes Act of April 30, 1790, Ch. 9, 1 Stat. 1112, 1113, and provided for punishment for murder or manslaughter if committed "within any fort, arsenal, dockyard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States." [6]

The second major phase of the statute was the addition of the phrase "any lands reserved or acquired for the use of the United States", which first appeared in § 72 of the Criminal Code of 1909, 35 Stat. 1142. Significantly, this enactment still retained the requirement that the lands must be under the exclusive jurisdiction of the United States. This new language was added to codify in one statute special jurisdictional sections

[6] The statute was subsequently amended by the Act of March 3, 1825, Ch. 65, § 4, 4 Stat. 115, and § 5339 of the Revised Statutes of 1874. These amendments retained the original language of the statute as enacted in 1790 and the requirement that the enumerated places be under "the sole and exclusive jurisdiction of the United States."

which had previously appeared throughout numerous statutes and to encompass decisions of this Court recognizing means and purposes in addition to those specifically enumerated in Article I, Section 8, Clause 17, by and for which land could be acquired from the states. Congress, however, intended no enlargement of its original grant of territorial jurisdiction. 42 Cong. Rec. 590, 1186.[7]

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[7] It was long thought that the only method by which the United States could acquire lands within the states was through purchases-by-consent, the only method enumerated in Article I, Section 8, Clause 17. Moreover, acquisition by this method invariably carried with it not only title but a complete legislative dominion with the exception of a permissible reservation by the state of the right to serve civil and criminal processes within the area. Ultimately, however, the Court construed the requirement of consent of the state legislature as a condition only of the acquisition of exclusive legislative jurisdiction, and not as a prerequisite of title or of power to use the land for proper federal purposes. In *Kohl* v. *United States*, 91 U.S. 367 (1876), the Court held that the federal government could exercise "the right of eminent domain within the states, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution." Subsequently the Court ruled that a state could cede exclusive legislative jurisdiction of land acquired otherwise than by purchase—with—consent. *Ft. Leavenworth R.R.* v. *Lowe*, 114 U.S. 525 (1885). This was true even though the land was acquired for a purpose not specified in Article I, Section 8, Clause 17. *Battle* v. *United States*, 209 U.S. 36 (1908) (the acquisition of land for a post office); *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518 (1938) (jurisdiction ceded over land to be used for a national park).

In reporting the 1909 compilation to the floor, Congressman Sherley referred to this judicial expansion of Article I, Section 8, Clause 17, stating:

> That section has been so enlarged by judicial construction as to embrace practically all different kinds of land now owned by the National Government. 42 Cong. Rec. 590.

Nothing said by Congressman Sherley can be construed as an expression of Congressional intent to apply the statute extraterritorially.

For present purposes, the final form of the statute was accomplished by the Act of June 11, 54 Stat. 304, wherein Congress amended § 451 of the 1940 Code, the predecessor to § 7(3), to include lands under the "exclusive or *concurrent* jurisdiction" of the United States. Prior to this amendment, federal criminal jurisdiction over land deemed desirable. The Act was acquisition by the United States of "exclusive jurisdiction within federal enclaves." By Act of February 1, 1940, 54 Stat. 19, as amended by Act of October 9, 1940, 54 Stat. 1083, Congress authorized officers of departments or agencies in charge of land to accept or secure consent from the states for either exclusive or partial jurisdiction over land deemed desirable. The act was designed to give broad discretion to Government agencies in order that they might obtain only the necessary jurisdiction. The 1940 amendment to 18 U.S.C. § 7 was designed solely to reflect this policy change in governmental acquisitions of land by conferring concurrent jurisdiction on the courts over crimes committed on federal reservations where the Government exercised partial jurisdiction.[8]

Thus, the legislative history buttresses the conclusion that "acquired lands" encompass only those existing within the strict territorial limits of the United States and not land temporarily acquired within the sovereign territory of another country. This conclusion is defi-

[8] The last modification of the statute occurred in 1948 when the Title was revised to its present form with the terms "special maritime and territorial jurisdiction" being substituted for the previous words "the crimes and offenses defined in §§ 451-468 of the Title shall be punished as herein prescribed." The Revisors' note to the 1948 revision indicates that despite minor changes "the extent of the special jurisdiction as originally enacted has been carefully followed."

nitively supported by the draftsmen of recent proposals to amend the Federal Criminal Code. The National Commission on Reform of Federal Criminal Laws reported the need for new legislation to fill jurisdictional gaps caused by Congress' heretofore strict adherence to territorial principles of criminal jurisdiction. In its study, the National Commission specifically concludes that United States courts are without jurisdiction to adjudicate the murder of an American Ambassador by his wife or a member of his staff in a diplomatic compound in a country wherein the American citizen enjoyed diplomatic immunity. Study Draft of a New Federal Criminal Code at XXXI. The Commission transmitted its final report to the President and Congress on January 19, 1971, and proposed adoption of the nationality principle of jurisdiction to cure this defect and others found by this Court. The Final Report of the National Commission on Reform of Criminal Laws, § 208(f), pp. 21-22. The administration has also recently introduced an additional bill entitled Criminal Code Reform Act of 1973, H.R. 6046, which contains a comparable provision.

Any court is loathe to render a decision which means for all practical purposes that petitioner can never be tried on this homicide charge. But the circumstances of this case serve to dramatize the deplorable jurisdictional gap which exists in the federal penal code. This Court should grant certiorari and reverse the holdings below to reaffirm the proper balance separation of power between the judicial and legislative branches. The District Court's assumption of jurisdiction in this case clearly conflicts with the doctrine that judicial power is solely dependent upon the action of Congress

conferring jurisdiction. *Carey* v. *Curtis*, 44 U.S. 236, 245 (1845); *Lockerty* v. *Phillips*, 319 U.S. 182, 187-88 (1943). The proper regard for the separation of powers mandates that the judicial branch refrain from stretching beyond delimited jurisdictional bounds to achieve a desirable result. By acknowledging the jurisdictional gap, additional and appropriate impetus for much-needed legislation will result.

2. Fifth and Sixth Amendment Violations

The fifth and sixth amendments in concert guarantee to a criminal accused a fair opportunity to defend himself. To realize that opportunity an accused must have the effective assistance of counsel, the right to cross-examine the witnesses against him and the ability to offer testimony on his own behalf. *Chambers* v. *Mississippi*, ——U.S.——, 12 Cr.L. 3150, 3153 (1973); *In re Oliver*, 333 U.S. 257, 273 (1948). Here, three factors combined to deprive Erdos of the full benefit of each of the guarantees:

1. The unprecedented locus for a homicide adjudicated in the federal courts — a foreign country so hostile and irrational that it refused entry to investigate the scene of the crime and to interview essential witnesses;
2. Erroneous rulings by the trial court inhibiting and/or precluding the presentation of relevant exculpatory evidence and improperly limiting the cross-examination of critical witnesses against the accused;
3. The government's failure to stipulate to reliable evidence from witnesses otherwise unavailable and then turning the absence of these witnesses to its advantage.

The only contested issue before the jury was whether because of a mental disease petitioner lacked the requisite *mens rea* to hold him responsible for an admitted killing. Resolution of this issue depended entirely on evaluating the credibility of the witnesses. On one level this credibility contest was between the two psychiatrists called by each side. But the fundamental credibility question, essential to resolving the conflict of the experts, was whether Erdos and his wife were telling the truth when they related the events which occurred in Equatorial Guinea and their effect on Mr. Erdos. The differing psychiatric judgments were based solely on the psychiatrists' opposing conclusions as to the honesty of the Erdoses; if they were telling the truth, the diagnosis of mental illness was inescapable. The government psychiatrists, however, disbelieved them principally because Mr. Erdos, despite detailed memory of Leahy's death, in their opinion would not relate the circumstances of the homosexual act the psychiatrists concluded had occurred. The defense psychiatrists opined that if Erdos participated in a homosexual act with Leahy, and they were not satisfied he had, neither the act nor his lack of memory was inconsistent with his mental illness.

Thus, the issue for the jury mirrored that of the psychiatrists—were the Erdoses telling the truth? The government's theory was that Erdos concocted the delusion only after the killing. Thus it had to discredit the Erdoses and disprove any indicia of mental illness in Erdos prior to the killing. The defense desparately needed corroboration for the Erdoses and proof not only of the indicia of mental illness prior to Leahy's death but also proof of the seeds for that disease—the paranoid domestic and international posture of the

Equatorial Guinean government. Against this background, the errors set forth below are individually and in toto urged as reasons for this Court to grant certiorari.

A. Inability to Secure Exculpatory Testimony

The right of a defendant to conduct a pretrial investigation and to present witnesses in his defense is a fundamental element of due process. This Court said in *Washington* v. *Texas*, 388 U.S. 14 (1967):

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. *Id.* at 19.

Due process also requires that the defense and the prosecution have the same opportunity to interview witnesses to insure that the trial is a successful quest for truth. *Gregory* v. *United States*, 125 U.S.App. D.C. 140, 369 F.2d 185, 188 (1966).

The government had the opportunity to investigate the scene and interview witnesses denied the defense. The fruits of the physical investigation of the scene—body, scissors, cord, clothing, etc.—were introduced to meet the burden of proving homicide. The defense's burden of persuasion was to convince the jury of Erdos lack of responsibility. For that purpose the defense needed the testimony of the people who knew Erdos on Equatorial Guinea—his diplomatic colleagues—at least the last person to see him before Leahy's death (Robert—France), the first person to see him afterwards (Cienfuegos—Spain) and his constant companion for three days after the death (Bassey—

Nigeria). After Leahy's death, Ambassador Hoffacker took statements from each of these men which provided much-needed corroboration of the Erdos's testimony of events on Equatorial Guinea and his aberrant behavior before[9] and after the killing, and, in part contained opinions as to his mental illness. Petitioner's inability to conduct his own investigation coupled with the court's denial of a continuance to secure the witnesses and the government's refusal to stipulate to their statements rendered the resultant trial fundamentally unfair.[10]

With the assistance of the State Department, petitioner diligently sought the testimony of these men.

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[9] On the critical issue of mental disease prior to Leahy's death, the trial court's misapplication of the hearsay rule deprived petitioner of critical evidence. Defense Exhibit 69 was a transcript of the message which Erdos described preparing with the aid of Leahy the morning of Leahy's death. It was recovered by government officials from the Embassy and decoded by the Department of State. The message and its method of preparation corroborate that petitioner expressed delusional thoughts prior to Leahy's death. This message, if admitted, would have been the defense's single most important exhibit and no respectable argument can be advanced for excluding it. Its authenticity was stipulated, it was relevant, and it was not hearsay.

[10] The witnesses sought here were foreign nationals beyond the formal subpoena power of the court. Doctrinaire concepts of "power" and "authority" cannot submerge the constitutional right to a fair trial. Smith v. Hooey, 393 U.S. 374, 381 (1969). Procedures exist in international law and comity for the production of testimony from foreign witnesses analogous to the interstate compacts for the production of witnesses this Court required to be exhausted in Barber v. Page, 390 U.S. 719 (1968). See The Signe, 37 F. Supp. 819 (D.C. La. 1941). See also 28 U.S.C. §§ 1781, 1782; Rule 15, Fed. R. Crim. P. Petitioner was working within these procedures when his efforts were curtailed by the denial of continuance.

His requests for a continuance of two months to complete these sensitive negotiations were repeatedly denied. When last requested, only the government of Spain had formally declined to make Mr. Cienfuegos available. Neither the French nor the Nigerian government had responded, and the government of Ghana was willing to make Mr. Munge available for testimony by letters rogatory. Had a continuance been granted, his testimony and that of the others might have been obtained in an admissible form. The denial of the continuance was without any valid reason. To the extent it was influenced by the court's belief depositions were inadmissible in a criminal trial, he was clearly in error. See Rule 15, Fed. R. Crim. P. The only other suggested basis for denying a continuance which was also sought by the government was citation to a policy of this Court to dispense "federal justice . . . within a minimum length of time." (T. 2 18 72, 16-17) This salutary policy should not be so maligned; justice in this instance demanded the continuance.

The prosecution's good faith efforts to obtain the testimony of absent witnesses required by *Barber* v. *Page*, 390 U.S. 719 (1968) ended with the court's denial of the continuance. Ignoring the court's encouragement, the prosecution refused to stipulate to any part of the expected testimony of the witnesses. Then, despite the corroborative statements in its files, the Government repeatedly branded the Erdoses as liars and urged the jury to reject the insanity defense "simply [because of] the lack of evidence from anybody but Erdos and his wife." (T. 1172) If failing to disclose exculpatory information violates due process of law, so too does refusing reasonable efforts

to place it before the trier of fact and then taking advantage of its absence. *Cf., Brady* v. *Maryland,* 373 U.S. 83 (1963).

A continuance was necessary to exhaust the government's good-faith efforts to obtain the witnesses' testimony but the court denied it. The court encouraged the government to stipulate to the testimony but the government refused and then turned the missing witnesses to its advantage. The result was the loss of favorable testimony to the accused and a trial which did not comport with the fifth and sixth amendments.

B. Restriction of Cross-Examination

The most difficult task for an advocate involved in a contested insanity defense is to refute the opinion of a psychiatric expert that the accused is feigning mental illness. See *United States* v. *Brawner,* 471 F.2d 969, 1036-37 (CADC, 1972) (Bazelon, J. concurring). One recent study based on 96 mock juries concludes:

> jurors were influenced by expert testimony when the testimony was not conflicting. In cases of conflicting expert testimony, or when there was no expert witness, there was a tendency for the jury to vote sane even though the defendant was clearly psychotic by the usual clinical criteria.

Klein & Temerlin, *On Expert Testimony in Sanity Cases,* 149 J. Nervous & Mental Disease 435, 438 (1969).

In addition to presenting two psychiatrists including the treating physician who unqualifiedly found psychosis, the defense attempted to overcome the conflicting diagnoses of malingering by cross-examination and

rebuttal. Both avenues of attack were erroneously cut off.[11]

Dr. Emory F. Hodges, one of the government's two psychiatrists, stated during both direct and cross-examination that he did "not find evidence of psychosis or insanity in Mr. Erdos" at the time of the killing. (T. 1058, 1066, 1117-18). Defense counsel sought to discredit this opinion by cross-examining Hodges from a leading psychiatric work, A. Freedman and H. Kaplan, *Comprehensive Textbook of Psychiatry*, Chapter 16 (1967), which cites the symptoms displayed by Erdos as the classic pattern of an acute paranoid psychosis. (T. 1117-18). Under questioning, Hodges recognized the treatise as being co-edited by the President Elect of the American Psychiatric Association, but further qualification of the treatise and examination from it were precluded by the court because the witness had not "read it all" and was "more unfamiliar than familiar" with it.

In 1949, this Court unequivocally held that such a ruling "was an undue restriction on the right to cross-examine". *Reilly* v. *Pinkus*, 338 U.S. 269, 275 (1949). The Court of Appeals recognized the restriction as

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[11] By a series of incorrect rulings, the court barred four experienced psychiatric nurses from giving opinion testimony as to petitioner's mental illness and from rebutting the allegation of malingering. Against the clear weight of authority and applicable decisions of this Court, the trial court applied a *per se* rule that only psychiatrists could render expert opinion testimony as to insanity and excluded all lay opinion on the issue. See, *Connecticut Mutual Life Ins. Co.* v. *Lathrop*, 111 U.S. 614 (1884); *United States* v. *Pickett*, 470 F.2d 1255 (C.A.D.C. 1972); *Jenkins* v. *United States*, 307 F.2d 637 (C.A.D.C. 1962) *(en banc)*; and J. Wigmore, *Evidence*, § 1638 (3d ed. 1940).

error but considered it harmless because petitioner had every opportunity to present his insanity defense. Of course this petition argues he did not. But moreover *Reilly* v. *Pinkus* rejected the concept of harmless error where intent of the party was an issue. And *Reilly* involved a civil case where the fact-finder actually read the excluded portions and concluded his findings would have been the same. *Id.* at 276. An effective attack on the gross inaccuracies in Hodges' testimony was of utmost importance to petitioner's defense. Hodges, who labelled Erdos a liar and malingerer, was petitioner's principal "accuser". The substantial restriction on his right to confront him by full cross-examination was error of constitutional proportions and in no sense harmless. See *Smith* v. *Illinois*, 390 U.S. 129 (1968).

C. Executive Privilege

Without regard for this Court's leading case on executive privilege, *United States* v. *Reynolds*, 345 U.S. 1 (1953), the Government invoked its privilege to block admissibility of twelve messages from Erdos to the State Department. (T. 290). The messages were relevant—they corroborated events which later became twisted into the delusional messages of August 30—and were not cumulative to the many other messages to which the Government did not exercise privilege. The Government originally sought excision of portions of the messages and when the court refused, opted to protect what it considered to be state secrets, namely, "the universal practice of not revealing diplomatic sources." (T. 285). The trial court ignored *Reynolds* in three respects. It did not enforce the requirement that the head of the government agency invoke the privilege

after personal review; it did not conduct an inquiry into the validity of the claimed privilege, and, finally, it permitted relevant evidence to be excluded in a criminal case under claim of state secret without requiring dismissal of the charges. At a time when governmental privilege threatens to become a major obstacle to the ascertainment of truth, this Court must check any erosion of the *Reynolds* doctrine.

CONCLUSION

The district court began the trial by denying without cause a continuance sought by both the prosecution and the defense which would have given time to exhaust available opportunities to produce testimony of foreign witnesses known to corroborate Erdos's version of the events, particularly his unstable condition immediately before and after Leahy's death. Then despite the court's encouragement, the prosecution refused to stipulate to the admissibility of statements from these witnesses made to a government investigator. During the trial, the court improperly restricted the defense's testing of government psychiatrists by preventing cross-examination upon learned treatises and refused to permit four psychiatric nurses to testify in rebuttal to the accusation of feigning. Finally, the court permitted the prosecution to exercise executive privilege and block the admissibility of messages demonstrating Erdos's knowledge of events which later precipitated his delusion, and misapplied the hearsay rule to exclude writings reflecting or affecting Erdos's state of mind. These errors, deprived Erdos of his right to due process, confrontation and a fair trial guaranteed by the fifth and sixth amendments and compel this Court's redress.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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